Editor's Note: Reconsideration denied by Order dated August 14, 2002.

THOMAS E. SMIGEL

IBLA 2000-55 Decided March 28, 2002

Appeal from a decision of the Field Manager, Las Vegas, Nevada, Field Office, Bureau of Land Management, disapproving occupancy of millsite claim in connection with mineral exploration and processing operations. N53-99-026N.

Affirmed.

1. Mining Claims: Millsites--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

   A mining claimant seeking to occupy the public lands by residence and maintenance of barriers to access in connection with operations on a mining claim and millsite must consult with and obtain the concurrence of the Bureau of Land Management prior to commencing occupancy.

2. Mining Claims: Millsites--Mining Claims: Surface Uses--Surface Resources Act: Occupancy

   Occupancy of the public lands in connection with operations on a mining claim and a millsite must be reasonably incidental to and commensurate with the scope of claimant's operations. A decision rejecting claimant's proposed occupancy will be affirmed when the occupancy exceeds that which is reasonably appropriate to operations on the claims.

APPEARANCES: Thomas E. Smigel, pro se; Mark R. Chatterton, Assistant Field Manager, Nonrenewable Resources, Las Vegas, Nevada, Field Office, Bureau of Land Management, U.S. Department of the Interior, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Thomas E. Smigel has appealed from an October 15, 1999, decision of the Field Manager, Las Vegas, Nevada, Field Office, Bureau of Land Management (BLM), disapproving his proposed occupancy of the ACS Mill Site claim, NMC-777908, in connection with mineral exploration and processing operations to be undertaken under Notice No. N53-99-026N.

On August 23, 1999, appellant filed with BLM a notice (supplemented on September 9, 1999) of intent to engage in mineral exploration and processing operations, and related activity, on the ACS Mill Site claim and the adjacent ACS No. 1 placer mining claim, NMC-777907. 1/ The two claims, which were both located by Smigel on September 2, 1997, are situated in sec. 12, T. 32 S., R. 65 E., and sec. 7, T. 32 S., R. 66 E., Mount Diablo Meridian, Clark County, Nevada. The notice was filed pursuant to 43 CFR 3809.1-3, since Smigel intended to engage in operations which would cumulatively disturb the surface of no more than five acres of public land, during any calendar year. 43 CFR 3809.1-3(a); Pierre J. Ott, 125 IBLA 250, 252 (1993).

In his notice, Smigel specifically proposed occupancy of the millsite claim in connection with his planned operations on the millsite and placer mining claims. Because occupancy was contemplated, appellant, as required by regulation, 2/ requested the concurrence of BLM. (Letter to BLM, dated October 22, 1997, at 1.) In his original October 1997 notice, Smigel stated that he intended to "explor[e] for placer mineral deposits via excavations to bedrock in several areas." Id. However, on September 9, 1999, he notified BLM that his mining activities would consist of "drilling * * * shallow holes as exploration sites." (Letter to BLM, dated September 8, 1999, at 1.) "Material thus collected will be crushed and/or screened and segregated." Id. Types of equipment to be used include "a gas powered generator, a gas powered post hole digger, various screens and separation tables and devices as well as various mining and mechanical hand tools." Id. The notice further stated that occasionally "motor driven equipment such as a front end loader or back hoe may be needed for material retrieval, movement and access maintenance." Id.

Construction of fences and gates controlling access to the millsite and placer claims is planned. (Letter to BLM, dated October 22, 1997, at 1.) Occupancy will entail reconstruction of a building on an existing slab on the millsite. Id. Smigel noted that the gem stones which would be produced at the proposed site include amethyst, tourmaline, spinel, corundum, agate, variscite, chalcedony, jasper, and obsidian. (Letter to BLM, dated May 26, 1998, at 2.) The building would be used to house a generator, lapidary equipment used for cutting and polishing gems, metal casting

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1/ Smigel had originally filed a notice (No. N53-98-003N) on Oct. 27, 1997, which was supplemented on May 28, 1998. However, in an Aug. 11, 1999, decision BLM returned this notice to Smigel, because he had failed to provide additional information necessary to complete BLM's processing of the notice in response to a July 13, 1998, letter. On Aug. 23, 1999, Smigel notified BLM that, rather than appealing its August 1999 decision, he desired simply to "resubmit this paperwork as a new notice." (Letter to BLM, dated Aug. 21, 1999.) It appears that Smigel and BLM chose to rely on the original notice and the supplemental information contained in a letter dated Sep. 8, 1999.

2/ 43 CFR 3715.3.

equipment to place the gems in jewelry, and precious metals to be used in the jewelry. Id. at 1. Smigel indicated that water for operations and residential use would be obtained from nearby "Hiko Spring," collected and transported by means of an underground line, and that a septic system would be constructed. Id.

By letter dated August 27, 1999, BLM required Smigel to submit "sufficient information on how your [proposed] occupancy [of the millsite claim] will meet the requirements of 43 CFR 3715.2 and 3715.2-1." (Letter to Smigel, dated August 27, 1999, at 1.) While Smigel responded on September 9, 1999, he did not expressly address the question of whether occupancy was permissible under the standards in 43 CFR 3715.2 and 3715.2-1.

By letter dated October 15, 1999, BLM notified Smigel that the notice, to the extent that it concerned proposed exploration and processing operations on the placer mining claim, comported with the informational requirements of 43 CFR Subpart 3809. In an October 1999 decision, which was issued the same day as the letter concerning operations on the placer mining claim, BLM disapproved occupancy of Smigel's millsite claim.

This decision was based on an analysis pursuant to 43 CFR 3715.2 and 3715.2-1 which led BLM to conclude that occupancy was not reasonably incident to prospecting, mining, or processing operations. In particular, BLM found that the proposed occupancy is beyond what is incident to the work proposed on the mining claim which is mainly casual use and exploration. (BLM Decision at 2.) Further, BLM found that appellant's proposed activities do not constitute substantially regular work in view of his acknowledgment that he would have limited time to work on the claim until his future retirement from his full time occupation. Id. With regard to the requirement that occupancy be reasonably calculated to lead to the extraction and beneficiation of minerals, BLM held that the proposed casual use and exploration of the placer claim may or may not lead to extraction of minerals. Id. Respecting the equipment to be used on site, BLM found that it was all portable and could be removed between periods of use. Id. Further, with regard to the need to protect valuable minerals from loss, BLM found that exploration sites were not proposed to be left open and there was no showing of a need to leave concentrations of minerals on site. Id. In addition, BLM held that the portability of the needed equipment eliminated the need for occupancy to protect against loss and that the claim was not located in such a remote area as to require occupancy to conduct operations. Id. at 3. Accordingly, occupancy was disapproved. Id.

Smigel appealed from the October 1999 BLM decision. In his statement of reasons (SOR) for appeal, appellant contends that processing ore requires costly development of equipment on site which is not readily portable. (SOR at 1.) Further, appellant contends a fence is necessary to establish to the public his right to have equipment and improvements on site. Id. Appellant also asserts that his full time employment elsewhere does not preclude him from conducting substantially regular work. Id. at 2. Additionally appellant argues that valuable ore occurs in large

quantities which would need to be left on site and protected pending processing. Id. at 3.

A response to the SOR has been filed on behalf of BLM. Asserting that the notice discloses that this is mainly an exploratory operation, BLM contends that a prudent operator would not place a lot of expensive equipment on site at this point. (BLM Answer at 2.) It is argued by BLM that the level of occupancy might require fences and structures if the claim were to go beyond the exploration phase, but that has not happened at this point. Id. at 2-3. Further, BLM contends that the millsite cannot properly be used to run appellant's lapidary business. Id. at 3.

While a mining claimant has the right of possession and enjoyment of the surface of mineral land encompassed by a valid lode or placer mining claim, under 30 U.S.C. §§ 26 and 35 (1994), and may thus engage in prospecting, mining, and processing operations on the claim, as well as on other nonmineral land encompassed by a valid millsite claim, under 30 U.S.C. § 42 (1994), it is now well established that his ability to otherwise use and occupy his claim, prior to patent, is limited by section 4(a) of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612(a) (1994), and relevant case law. These generally require that use and occupancy be "reasonably incident" to prospecting, mining, or processing operations. See, e.g., Richard Oldman, 146 IBLA 220, 222-23 (1998); United States v. Doherty, 125 IBLA 296, 299-300 (1993); United States v. Peterson, 125 IBLA 72, 77-78 (1993); Bruce W. Crawford, 86 IBLA 350, 358-59, 363-64, 373-75, 92 I.D. 208, 213, 216, 220-22 (1985). As we said in Crawford: "The exclusive right of possession [and enjoyment] afforded by 30 U.S.C. § 26 (19[94]) is limited to uses [and occupancy] reasonably incident to actual mining [or related activity]." 86 IBLA at 375 n.18, 92 I.D. at 222 n.18.

[1] In order to implement this requirement, the Department promulgated regulations, 43 CFR Subpart 3715, effective August 15, 1996, pursuant to section 4(a) of the Surface Resources Act and other statutory authority, which require obtaining BLM's concurrence with the occupancy of mining and millsite claims, prior to initiating any such occupancy. Wilbur L. Hulse, 153 IBLA 362, 367 (2000); see 43 CFR 3715.3; 61 FR 37116, 37121 (July 16, 1996). Under these regulations, occupancy is defined to include full or part time residence on the public lands or the construction, maintenance, or presence of structures used for such purposes. 43 CFR 3715.0-5. The term residence or structures also includes fences, barriers to access, or storage of equipment or supplies. Id. A claimant must consult with BLM prior to commencing occupancy. 43 CFR 3715.3. The consultation will result in an adjudication of the proposed occupancy and a decision expressing the concurrence or non-concurrence of BLM. 43 CFR
3715.3-4. In the absence of BLM concurrence, occupancy must not be initiated. 43 CFR 3715.3-6.

[2] Under the relevant regulations governing occupancy of the public lands, in order to "occupy" the public lands for more than 14 days in any 90-day period, the claimant's activities on the land must:

> (a) Be reasonably incident;
> (b) Constitute substantially regular work;
> (c) Be reasonably calculated to lead to the extraction and beneficiation of minerals;
> (d) Involve observable on-the-ground activity that BLM may verify under § 3715.7; and
> (e) Use appropriate equipment that is presently operable, subject to the need for reasonable assembly, maintenance, repair * * *.

43 CFR 3715.2. 3/ The term "reasonably incident" is defined to include "those actions or expenditures of labor and resources by a person of ordinary prudence to prospect, explore, define, develop, mine, or beneficiate a valuable mineral deposit." 43 CFR 3715.0-5.

Thus, as a threshold matter, any occupancy proposed by the claimant must be reasonably related to actual activities on the claims involving prospecting, mining, or processing operations. Hence, the extent of permissible occupancy is directly related to the extent of mining and processing activity conducted on the claims. The structures and equipment maintained on site must be related to and commensurate with the operations. David E. Pierce, 153 IBLA 348, 358 (2000); Bradshaw Industries, 152 IBLA 57, 63 (2000). The BLM decision found that the proposed occupancy was beyond that required for exploration of the placer mining claim. (BLM Decision at 2.) Similarly, BLM asserted in its answer that "[s]tatements in the Notice show that this is mainly [an] exploratory operation. A prudent operator would not invest time or money by placing large and expensive amounts of equipment on site to process minerals which may not be there." (BLM Answer at 2.)

We note that the record does not contain any evidence that appellant was, at the time of BLM's October 1999 decision, engaged in any prospecting, mining, or processing operations, or any uses reasonably incident thereto, on his placer or millsite claim, or that he has ever engaged in any such activities. Nor has appellant asserted, on appeal, that such activities are taking place or have taken place at any time, on the claims. This is despite the fact that he is not precluded from doing so by 43 CFR 3809.1-3, to the extent that his activities conform to his notice and thus come within the ambit of that regulation, and therefore do not require prior BLM approval. See 43 CFR 3809.1-3(b); Pierre J. Ott, 125 IBLA at 252. The record also supports BLM's contention that in the absence of a showing that valuable minerals are being mined on the claim, there is no need for occupancy to protect mined reserves from theft or loss. To the extent that appellant seeks to justify occupancy on the basis of plans to
import supplies of precious metals such as gold for use in jewelry fabrication on the millsite, the need to protect such supplies does not justify

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3/ In addition to fulfilling all of the requirements of 43 CFR 3715.2(a) through (e), occupancy must involve one or more of the elements set forth at 43 CFR 3715.2-1(a) through (e).

occupancy of the public lands. A manufacturing operation such as the fabrication of jewelry is properly distinguished from activities reasonably incident to mining on the public lands. See 43 CFR 3715.2; cf. United States v. Peterson, 125 IBLA at 85-87 (Conduct of a salvage yard operation.)

Rather, it seems clear that appellant intends to principally engage, at least at the outset, in limited prospecting or exploration operations on his mining claim, which will, if merited by the exposure of valuable minerals, be transformed into more extensive exploration operations, with the processing of recovered materials to occur on his millsite claim. See Letter to BLM, dated September 8, 1999, at 1 ("Activities beneficial to mining will consist of the drilling of shallow holes as exploration sites[.] * * * [T]he gathered material will be further processed in and around the mill site structure."); see also Letter to BLM from the Smigels, dated October 22, 1997, at 1 ("[S]urface mining activities within this area will include exploring for placer mineral deposits * * * [and] processing ore thus acquired"); SOR at 2 ("The work proposed includes prospecting, exploring, developing and the beneficiation of minerals"). Accordingly, we conclude that the record supports the BLM decision finding that the proposed occupancy is not reasonably incidental to mining activity at this point. 4/

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

C. Randall Grant, Jr.
Administrative Judge

I concur:

James F. Roberts
Administrative Judge

4/ Because we find that appellant's proposed occupancy is not reasonably incident to the current mining operation, we need not further address the additional prerequisites of occupancy set forth at 43 CFR 3715.2-1.